

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 02-0058  
TAX ADMINISTRATION  
For Years 1997 and 1998**

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**ISSUES**

**I. Tax administration – Credit for Prior Tax Paid**

**Authority:** 45 IAC 2.2-3-16; 45 IAC 2.2-3-12

Taxpayer protests the imposition of Indiana use tax on transactions for which Kentucky sales tax had previously been paid by a third party contractor.

**STATEMENT OF FACTS**

Taxpayer is a Kentucky corporation that owns and operates several restaurants in Kentucky and that opened a restaurant in Indiana in 1998. The restaurant was built by a Kentucky-based contractor. Said contractor purchased the materials used in the construction of the restaurant in Kentucky, paid Kentucky sales tax on the materials, and brought them into Indiana for the construction project.

The contractor, through a time and materials contract signed by taxpayer, did not bill taxpayer directly for the sales tax it paid in Kentucky. Rather the contractor incorporated the Kentucky sales tax into the materials charges and charged taxpayer accordingly.

**DISCUSSION**

**I. Tax administration – Credit for Prior Tax Paid**

Taxpayer believes that, because the contractor that built its restaurant had previously paid sales tax to the state of Kentucky, it should be credited for such against its own use tax liability through 45 IAC 2.2-3-16, which states:

Liability for Indiana use tax shall be reduced by a credit for the amount of any sale, purchase, or use tax paid to any other state, territory or possession of the United States with respect to the tangible personal property on which Indiana use tax applies.

The auditor believes that this credit should not be given when the tax paid to another state is made in error. While this reasoning is sound, such a conclusion need not be reached because the sales tax paid to Kentucky by the contractor is irrelevant to the liability of the taxpayer.

Taxpayer invites the Department to examine the tax laws of Kentucky to determine whether or not the contractor properly paid the Kentucky sales tax. The Department respectfully refuses this request as the contractor's payment of Kentucky sales tax is not at issue in the present case. What are at issue are the taxpayer's transactions with the contractor that took place in Indiana.

When the contractor sold the items in question to taxpayer, it did so in Indiana and without charging the taxpayer Indiana sales tax. Because the taxpayer did not pay sales tax to the contractor, it became liable for use tax under 45 IAC 2.2-3-12, which provides:

- (a) Tangible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor.
- (b) In order to be exempt on such purchases, the contractor must be registered as a retail merchant, must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier.
- (c) Utilities, machinery, tools, forms, supplies, equipment, or any other items used or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.
- (d) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchaser [sic.] price of all material so used.
- (e) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sale of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

Taxpayer may not step into the shoes of its contractor and make use of its credits, be they meritorious or not.

### **FINDINGS**

The taxpayer is respectfully denied.